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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SHEARSON/AMERICAN EXPRESS INC. and JASON ALBERTSON,
Petitioners,

vs.

CHARLES E. NEELY and JO MARIE DIMAGGIO,
Respondents.

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

A. Should a brokerage house be responsible to a customer for that portion of the customer's damages which is attributable only to adverse market forces, rather than any act or omission by the brokerage house?

B. May a punitive damage award which is based upon an inflated compensatory award (which fails to recognize actual market forces) be upheld?

C. Was the award of punitive damages in a ratio of ten times compensatory damages excessive as a matter of law in a business tort case?

THE PARTIES

The parties to this action are Petitioners, SHEARSON/ AMERICAN EXPRESS INC. ("Shearson") and JASON ALBERTSON ("Albertson"), and Respondents, CHARLES E. NEELY and JoMARIE DiMAGGIO, husband and wife (collectively "Neely" or the "Neelys").

For the Court's information, Shearson has, since the inception of this litigation, acquired the entity formerly known as Lehman Brothers Kuhn Loeb, Inc., and is now known as Shearson Lehman/American Express Inc.

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I.

OFFICIAL AND UNOFFICIAL REPORTS.

There are no reported opinions arising out of this litigation. Although the United States Court of Appeals for the Ninth Circuit did issue a memorandum opinion, filed on July 11, 1984, which discusses the issues raised in this petition, the court ordered that their memorandum opinion not be published in the Federal Reporter. A copy of that opinion is attached to the Appendix, labeled Exhibit "1," and incorporated herein by this reference.

II.

BASIS FOR SUPREME COURT JURISDICTION.

This petition arises from a decision of the United States Court of Appeals for the Ninth Circuit. That decision was filed and entered on July 11, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2101(c) and Rule 20.2 of the Rules of the Supreme Court.

III.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

The resolution of the questions presented in this Petition does not involve a consideration of any constitutional provisions, treaties, statutes, ordinances or regulations. All questions involve the calculation of damages on a securities claim.

One statute will be referenced, however, in discussing the judicial calculation of damages. 15 U.S.C. § 78bb of the Securities Exchange Act of 1934 provides in pertinent part as follows:

> (a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or office or performing like functions) or any State over any security or any person insofar as it does not conflict with the provisions of this chapter of the rules and regulations thereunder.

IV.

STATEMENT OF THE CASE.

A. Procedural History.

The complaint was filed in this action by the Neelys on May 25, 1982. That complaint sought damages against their former stock broker, Shearson, and their account executive, Albertson, alleging violations of the Securities Exchange Act of 1934, breach of fiduciary duty and negligence in the handling of their stock portfolio. In particular, plaintiffs alleged that the trades made in their account were unsuitable for them, that the account was excessively traded and that any loss in the portfolio would be limited to five percent of the original portfolio.

Jurisdiction in the district court was based upon 28 U.S.C. § 1331 (federal question) and § 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa).

The matter was tried before a jury in the United States District Court in Phoenix, Arizona, before the Honorable Carl Muecke, commencing on June 21, 1983. At the conclusion of trial, the jury awarded compensatory damages against both defendants in the sum of $21,959, representing the total loss on the account on both the admittedly suitable as well as unsuitable stocks. In addition, punitive damages were awarded against Shearson in the sum of $100,000 and against Albertson in the sum of $10,000. (A copy of the judgment entered by the trial court is attached to the Appendix, labeled Exhibit "2," and incorporated by this reference).

Following the entry of judgment in the trial court below, as well as defendants' motion for a new trial and for a remittitur, defendants filed a notice of appeal with the district court in September 1, 1983. Following briefing and oral argument, the Court of Appeals affirmed the

judgment of the district court in a written opinion filed on July 11, 1984. (This opinion has previously been incorporated as Exhibit "1" to the Appendix.)

This Petition for Writ of Certiorari arises out of the affirmance of the trial court's judgment by the Court of Appeals.

B. Statement of Facts.

The Neelys opened an account with the Lancaster, California office of Shearson on March 2, 1981. They delivered to Shearson and Mr. Albertson cash of $10,000 along with their existing portfolio consisting of ten stocks valued at $63,000 on which they were earning income of only two to three per cent per year. These stocks had been inherited by Mrs. Neely from her father in 1977.

Although each plaintiff holds a bachelor's and master's degree, they had limited stock market experience prior to March 1981. Mr. Neely was employed as a real estate salesman and Mrs. Neely was unemployed having recently left her position as an equal employment opportunity officer at NASA. Plaintiffs advised Mr. Albertson that they had an annual income of $32,000 per year and a net worth of approximately $160,000. They stated that their investment objectives were income and growth combined with both safety and risk.

Prior to any trades being made in the account, Mr. Albertson reviewed with the Neelys various investment alternatives available to them, including options, annuities, and various stocks he had previously researched. Mr. Albertson's handwritten notes of these recommendations were prepared during the initial conference with the Neelys and were received in evidence at trial. On or about March 30, 1981, Shearson mailed to the Neelys a letter confirming the information they had given to Mr. Albertson on their assets

and investment objectives, advising them of the risk of loss in the securities market and requesting the Neelys to contact Shearson directly if any of the information furnished by Mr. Albertson was inaccurate. The Neelys admitted they received it, read it, and made no objections to Shearson or Mr. Albertson of any inaccuracies. Since Mrs. Neely was partially blind, she acknowledged that her husband read and then advised her of the contents of the new account papers they were given by Shearson to sign.

Mrs. Neely relied on her husband to advise her what was disclosed in each document and on the monthly statements. One of the documents which the Neelys signed and delivered to Shearson was a Discretionary Authorization agreement which authorized Mr. Albertson to select securities and options which he felt appropriate for the account without prior consultation with the Neelys. The Neelys also sent Mr. Albertson a letter requesting that he assume personal discretion over the account.

Shortly after the Neelys opened their account, they delivered to Mr. Albertson a handwritten "Letter of Instructions" dated March 25, 1981 setting forth seven requests in the handling of their account. Mrs. Neely admitted that all their requests were met except one which requested $400 per month income. She understood this request could not be met because the Neelys made large cash withdrawals from their account. The Neelys also testified that Albertson stated he would not churn their account like a drunken sailor.

During the first sixty days the account was open, Mr. Albertson liquidated the bulk of the original portfolio deposited by the Neelys. The Neelys originally alleged that both the liquidation of the original portfolio and the subsequent purchase of other stocks and options were unsuitable for them. The Neelys' expert witness, Eugene Tom-

pane, testified however that, in his expert opinion, Mr. Albertson's liquidation of the original portfolio was totally suitable and was in the Neelys' best interest since the stocks therein were not consistent with the Neelys' investment objectives. The stocks in the original portfolio were also declining in value at that time. The Neelys admitted they never complained about the liquidation of the original portfolio.

Within a few days of every purchase and sale made in the account, the Neelys received and acknowledged that they understood the written confirmation slips advising them of the trade, the price received or due, and the commission earned. Each month they received a statement summarizing the trades in the account as well as the changing equity value in their account. Plaintiffs acknowledge reading each of these documents and making no complaint regarding any of the trades or the performance of the account. Each month Mr. Neely stated that he reviewed the statements and in his own handwriting verified on the face of the statements the market value and equity of each stock in the portfolio.

With the proceeds from the liquidation of the original portfolio, Mr. Albertson purchased thirteen new stocks and wrote options on six of the stocks. Mr. Tompane, plaintiffs' expert, testified that in his expert opinion all of these new stocks were both suitable for the Neelys and appropriate for their account, except the following five stocks: Diagnostic Data, Sargent Industries, Immutron, Scott Industries, and Del Webb Corp. These five stocks lost $11,706 including commissions.

Mr. Tompane further testified that the strategy used by Mr. Albertson on the option trades was the most conservative strategy in the field of options and that all companies were suitable on which to write options. Mr. Albertson

testified that he was thoroughly familiar with each of the five stocks in question and had in addition purchased these five stocks for his own personal account. The Albertsons also suffered losses in the same five stocks. During the time the Neelys were investing at Shearson, the stock market declined twelve percent due primarily to the unprecedented rise in interest rates. Both Mr. and Mrs. Neely admitted being aware that the stock market was dropping in 1981 based on news reports they had heard or received.

In both June and September 1981, Shearson delivered to the Neelys an Asset Review Sheet summarizing the performance in their portfolio. This sheet was a supplement to the monthly statements and provided additional information to keep customers fully informed of the status of their accounts. The Asset Review Sheet disclosed, among other things, each stock and option in the account, its value, yield, income earned, Standard & Poor rating, and the account's equity.

The entire portfolio had a value on June 29, 1981 of $55,296. Mr. Neely acknowledged that he was aware that he opened his account in March, 1981, with a value of $74,000, that he had withdrawn cash from the account as of June 29 in the sum of $10,000 and that if there had been no decline in the market value he should have an account worth approximately $64,000 as of June 29. Despite the $9,000 paper loss in the account Mr. Neely made no complaint about the account's performance in either June or September of 1981.

Mr. Neely acknowledged that he never advised anyone at Shearson of Mr. Albertson's "5% maximum loss" representation until their complaint was filed in 1981. Plaintiffs also admitted they were aware they had the right to close their account or change their broker any time they were unhappy with the account's performance. The Neelys were aware

there was a risk of loss in buying stocks and that this was not a guaranteed investment. However, they felt the risk was minimal similar to owning stocks such as Boeing or General Dynamics.

The Neely's evidence on the alleged excessive trading in the account also came from Mr. Tompane, their expert witness. However, Mr. Tompane acknowledged that the annual turnover ratio using the Looper formula was only 3.03. Mr. Philip deRoulet, defendants' expert, testified that the Looper formula had been discredited by the Securities & Exchange Commission since it exaggerated the turnover rate. Further, under the decision in *Rolf v. Blyth Eastman Dillon*, 424 F. Supp. 1021 (1977), activity is generally not considered excessive even under the Looper formula until a turnover of 6.0 is reached.

On December 10, 1981, the Neelys requested that all of their cash and securities be sent to them since they were now residents of Arizona. The final securities were delivered out of the account in March, 1982.

V.

ARGUMENT.

A. The Trial Court Erred in Awarding Damages to Plaintiffs Which Do Not Take Into Consideration the Effect of Actual Market Forces and Which Grant to Plaintiffs a Sum of Damages Which Exceeds the Amount They Would Have Received Had They Made No Trades Whatsoever at Shearson.

A hearing from this court is necessary to resolve the present controversy between the various jurisdictions as to whether or not market forces should be considered in calculating and awarding damages. Shearson cites authorities from the Fifth Circuit (*Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318 (5th Cir. 1981)), Second Circuit (*Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38 (2nd Cir. 1978)) and various SEC decisions as support for its position that damages, as presently awarded, are inflated as failing to recognize market forces. Plaintiffs cite the California case of *Twomey v. Mitchum, Jones & Templeton, Incorporated*, 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968), as well as SEC opinions in support of their position that no reduction can be given for losses caused by market forces. The Court of Appeals, almost without discussion ruled in plaintiffs' favor on the issue, though strangely citing *Miley v. Oppenheimer & Co., supra*, which is supportive of Shearson's position. (See especially 637 F.2d at 327-328.)

A ruling from this Court is necessary to resolve the confusion and ambiguity which now exists as to whether market forces should be considered in the calculation of damages in a securities account. In addition, review by this Court is necessary and proper in order to obtain a final ruling on this federal question which continues to acquire increasing significance.

Prior to the commencement of the trial, plaintiffs' counsel made a motion in limine to exclude evidence on the performance of the Neelys' original portfolio if no trading had ever been done. Defendant filed written objections thereto and sought to demonstrate that the Neelys' original account would have declined, due to general market conditions, by an amount in excess of $22,000 if no trading had taken place. This normal market decline was in excess of what actually happened to plaintiffs' portfolio as a result of the trades by the defendants. The matter was argued in chambers and also in court following which the plaintiffs' motion to exclude evidence was granted.

Defendants, based on the authorities hereinafter cited, contended that evidence on this subject was a crucial part of their defense for the following reasons:

1. The evidence would rebut plaintiffs' claims that it was inappropriate or unsuitable to sell the original portfolio or that defendants were negligent in advising the sale.

2. The evidence would rebut plaintiffs' claim that they suffered damages as a result of the liquidation.

3. The evidence would demonstrate that the Neelys' original account was declining at a rate in excess of the general market decline.

4. The evidence would show that had no mishandling of the portfolio occurred, the account would have declined by that percentage anyway (*Rolf v. Blyth Eastman Dillon, infra*).

In the case of *Twomey v. Mitchum, Jones & Templeton*, 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968), the court permitted testimony as to what might have happened to the plaintiff's original portfolio during the time the plain-

tiff maintained an account at the brokerage firm. At page 251 (note 37) the court stated:

> The evidence reflects that it [plaintiff's original account] would have enhanced in value if it had been retained in the form in which it was held by plaintiff at the time the defendants took over the account. There is no evidence to show that an otherwise properly managed account for a customer of the nature of plaintiff would have ultimately depreciated in value over the period involved. There is no evidence to show that they are other than what would have been yielded by a properly selected and managed account.

In the case of *R. H. Johnson & Company,* 33 SEC 180, the Securities & Exchange Commission was called upon to review the facts of an alleged churning case involving the account of an elderly widow and her daughter. In analyzing the trades, the court permitted testimony regarding what would have happened to the portfolio during the account period if no trades had taken place. The Commission stated at page 183 of the decision:

> Had the customers, instead of placing their account with applicant [brokerage firm], simply continued holding the securities they originally owned, their account on the date it was closed would have shown an increased market value of about $2,663.

The *R. H. Johnson* case is identical to the issue in the *Neely* case regarding the relevance of how an account would have performed if defendants had not handled it.

The court in *Bethel Johnsen & Company,* 26 SEC 167 was faced with the same issue on two different customers' accounts and reached the same conclusion by holding as follows:

> Had the initial portfolios which had a market value of $54,008 on May 18, 1942 been left intact, however, their market value at the end of the period would have been $89,179.

In reviewing the trading in the second account, the court stated at page 168:

> Had the original portfolio not been disturbed, however, its value on May 7, 1945 would have been $70,933.

In addition, the case of *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 637 F.2d 77 (1980), permitted such testimony by holding at page 84, that "If no fraud had been committed the portfolio would have declined by this percentage anyway."

As the court stated in *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 327 (5th Cir. 1981):

> It is clear that awarding full "out of pocket" recovery — i.e., the difference between the original and final values of Miley's portfolio would be to assume, in effect, that none of Oppenheimer's transactions were legitimate, and to disregard the ordinary hazards of the stock market. (637 F.2d at 327.)

Shearson respectfully submits that this Petition should be granted and that Shearson is entitled to an order from this court reversing the judgments of the Ninth Circuit and the trial court and awarding to Shearson an offset for all losses which were caused by market forces rather than the acts or omissions of Shearson.

B. The Award of Punitive Damages Is Improper Insofar as (1) It Is Based Upon an Inflated Compensatory Award as Is Set Forth Above; and (2) It Constitutes an Abuse of Discretion in Awarding Punitive Damages Well in Excess of the Three-to-One Ratio Established by the Fifth Circuit in Miley v. Oppenheimer & Co.

The need for relief from this Court as a result of the failure of the courts below to consider market forces in calculating the size of the award has been set forth above. As to punitive damages relating to this point, it is sufficient to note that the error or prejudice is compounded or magnified substantially when that improper compensatory award is used as a basis for establishing a related punitive damage award.

This Court's intervention is necessary, however, for yet another reason. Examination of the law regarding punitive damage awards in business tort cases reveals that the area is almost without judicial precedent or guideline. Except for the Fifth Circuit delineation of a 3:1 guideline in *Miley v. Oppenheimer & Co.*, there is little authority upon which to base such an award. Certain courts, cited by plaintiffs, such as the California court of appeal in *Wetherbee v. United Insurance Company of America*, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971), have held that no standard or guideline can be stated with regard to the ratio between punitive and compensatory damages. Shearson submits that in this expanding area of litigation where the size and nature of verdicts rendered continue to accelerate, some special rule or guideline should be established for regulating the award of punitive damages in business tort litigation, especially in those cases which are based upon securities violations and have their foundation in the Securities Exchange Act of 1934 for which awards of punitive damages are not even allowed (15 U.S.C. 78bb).

Shearson submits that the jury abused its discretion in this case by awarding punitive damages in excess of a 3:1 ratio of punitive to actual damages. In the recent case of *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318 (5th Cir. 1981) the Court of Appeals analyzed an award of punitive damages in a securities fraud case of $100,000 as compared to the $54,000 compensatory damages award (2:1 ratio). The court, in upholding the award, stated at page 331:

> Although we do not decide what amount of punitive damages, if any, should be awarded in every intentional, business tort case, we feel that a formula of punitive damages equal to three times compensatory damages is a fairly good standard against which to assess whether a jury abused its discretion. While there is nothing magical about the three-times-compensatory-damage formula, many courts which have weighed the kind of factors which comprise the Texas four-part test in awarding punitive damages for intentional big business torts, have selected that figure. *See, e.g., Palmer Coal & Rock Co. v. Gulf Oil Co.*, 524 F.2d 884, 887 (10th Cir. 1975), *cert. denied*, 424 U.S. 969, 96 S.Ct. 1466, 47 L.Ed. 2d 736 (1976) (affirming award of $1,500,000 punitive damages in fraud case with $500,000 compensatory damages); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336 (9th Cir. 1976), *cert. denied*, 429 U.S. 1097, 97 S.Ct. 1115, 51 L.Ed. 2d 544 (1977) (lowering punitive damages in business fraud case to $35,000 where average compensatory damage was $12,000); *Malandris v. Merrill, Lynch, Pierce, Fenner & Smith*, 03 F.2d 1152 (1983) (reducing $3,000,000 punitive damages in investor fraud case to $1,000,000 where compensatory damages were $1,030,000).

Moreover, we are greatly impressed by one commentator's insightful analysis on this issue:

> .... [T]he only sure way of deterring such conduct in the future is to take the profit away from the wrongdoers and slap on an additional amount as punitive damages: an award equal to treble damages would be fair, reasonable and well within the public interest.

In determining the reasonableness of the amount of punitive damages the relevant criteria include, according to the California court of appeal in *Rosener v. Sears Roebuck & Co.*, 110 Cal. App. 3d 740 (1980):

> (1) the particular nature of defendant's acts in light of the whole record;
>
> (2) the amount of defendant's wealth; and
>
> (3) the relationship of compensatory damages awarded compared to the punitive damages.

When the entire record of the instant proceeding is reviewed, the reasonable relationship between compensatory and punitive damages is found to be absent. This is especially true as to defendant Shearson in view of the nature of its acts which were shown to be at best a failure to adequately supervise defendant Albertson's selection of stocks. If the appellate court agrees that under the evidence the maximum compensatory damages should only be $11,706, then the award of $110,000 in punitive damages becomes even more unreasonable.

VI.

CONCLUSION.

For the reasons set forth above, Petitioners respectfully request that this Petition for Certiorari be granted and that Petitioners be allowed to present further legal arguments to this Court in support of their contentions that the compensatory and punitive damage award were incorrect and excessive as a matter of law.

Dated: September . , 1984

Respectfully submitted,

MICHAEL M. GLESS
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Members of KEESAL, YOUNG & LOGAN

Attorneys for Shearson/ American Express Inc. and Jason Albertson

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles E. Neely, et al.,
Plaintiffs/Appellees,

v.

Shearson/American Express Inc.
and Jason Albertson,
Defendants/Appellants.

Appeal from the United States District Court
for the District of Arizona at Phoenix
Honorable Carl A. Muecke, District Judge, Presiding
Argued and Submitted April 13, 1984

No. 83-2373
(DC# CIV-82-776-PHX-CAM)
MEMORANDUM*

[Filed: July 11, 1984]
Before WISDOM**, ANDERSON, and SCHROEDER,
Circuit Judges.

Charles Neely and his wife, Jo Marie DiMaggio, brought this action against Shearson/American Express, Inc. and Jason Albertson alleging violations of section 10b of the Securities Exchange Act of 1934 and rule 10b-5, breach of fiduciary duty, and negligence in connection with the defendants management of the plaintiffs' securities portfolio.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

**Senior Circuit Judge of the Court of Appeals for the Fifth Circuit, sitting by designation.

The jury awarded the plaintiffs $21,959 in compensatory damages and $110,000 in punitive damages. The defendants appeal.

On appeal, Albertson and Shearson contend that the trial court erred in excluding evidence of the performance of the plaintiffs' original portfolio during the relevant period. They also maintain that a new trial is required, because the district judge erroneously dismissed a regular juror instead of the alternate juror at the close of the trial. Finally, the defendants contest the damage award on three grounds. They contend that the amount of the compensatory award was excessive as a matter of law. They maintain that the evidence did not sustain an award of punitive damages. Alternatively, they contend that the amount of the punitive award was excessive as a matter of law, because the ratio of compensatory-to-punitive damages was greater than three-to-one.

These contentions are meritless and can be disposed of summarily. We affirm the jury verdict for the plaintiffs.

First, the defendants have not shown that the trial judge abused his discretion in excluding the evidence regarding the performance of the plaintiffs' original portfolio. Neely and DiMaggio entered into an agreement with the defendants to manage their portfolio. By entering into this agreement, Albertson and Shearson assumed a fiduciary duty to the plaintiffs. *See, e.g.*, Mihara v. Dean Witter & Co., 619 F.2d 814, 825 (9th Cir. 1980); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38 (2nd Cir. 1978); Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222, 249 (1968). Evidence that the plaintiffs would have fared no better without the defendants' assistance is not relevant to the plaintiff's claim of mismanagement. *See*

Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981). The district court did not abuse its discretion in excluding the evidence.

Second, the trial court's erroneous dismissal of a regular juror, rather than an alternate juror, does not warrant a new trial. *See* United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964). Under rule 47(b) of the Federal Rules of Civil Procedure, alternate jurors must possess the same qualifications as regular jurors. The defendants have not alleged that the alternate juror was unqualified or that they were prejudiced by the trial judge's error. Nor did they object at trial. We find in these circumstances that the district judge did not commit reversible error in seating a qualified, alternate juror who had been present and attentive during the entire proceedings.

Third, the amount of compensatory damages awarded by the jury was not excessive as a matter of law. The award was consistent with a finding of breach of fiduciary duty. The trial judge instructed the jury "to award [the] plaintiffs damages equal to the loss in portfolio value, including any excessive commissions, [that] resulted from [the defendants] breach of duty". Record, vol. 7, at 114. He also instructed the jury on the calculation of the loss in portfolio value, stating that "[t]he amount of damage is arrived at by taking the value of the original portfolio, adjust[ing] that sum by the percentage change in an appropriate index . . . between the date the account was opened and the date that it was closed, deduct[ing] the funds that the plaintiffs withdrew and then deduct[ing] the [closing] value of the portfolio". *Id.* at 111. The jury's award of $21,959 is consistent with this instruction.

Fourth, the award of punitive damages was proper. California law permits the award of punitive damages when the defendant's conduct is oppressive, fraudulent, or malicious. Cal. Civ. Code § 3294 (Deering 1983). Under California law, the issue of punitive damages can be submitted to the jury based on evidence that a broker engaged in excessive trading in a client's account. *Mihara*, 619 F.2d at 825-26 (9th Cir. 1980). *Accord* Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981) (applying Texas law). There was sufficient evidence of churning in this case for the jury to award punitive damages. The defendants' argument that any award of punitive damages was improper must be rejected.

Nor was the amount of the punitive damage award excessive. California law does not impose a fixed ratio of compensatory-to-punitive damages. *See* Wetherbee v. United Insurance Company of America, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971), upholding a punitive damage award of $200,000 based on a compensatory award of $1,050. Finding that the award is lawful under California law, this Court's discretion to overturn the jury's award is limited. We will overturn an award only if it appears that the jury was influenced by passion or prejudice. Harmsen v. Smith, 693 F.2d 932 (9th Cir. 1983). We find no evidence of improper influence in this case. We, therefore, uphold the jury's award.

The judgment of the district court is AFFIRMED.

United States District Court, District of Arizona

Charles E. Neely and Jo Marie DiMaggio,
husband and wife,
Plaintiffs,

vs

Shearson/American Express, Inc., a Delaware corporation;
Jason Albertson,
Defendants.

No. CIV-82-776-PHX-CAM

JUDGMENT

The above entitled and numbered cause having come on regularly for trial before a jury on June 21, 1983, June 22, 1983, June 23, 1983, June 24, 1983, June 29, 1983 and June 30, 1983, and the plaintiffs being present in person and with their attorney, Albert M. Goldberg, and the defendants being present with their attorney, Michael M. Gless of Keesal, Young & Logan, and both parties having announced ready and the plaintiffs having introduced evidence in support of their complaint and the defendants having introduced evidence in opposition thereto, and the matter having been submitted to the jury for their determination, and the jury having returned a verdict in favor of the plaintiffs in which they granted compensatory damages to the plaintiffs in the amount of $21,959.74, and did also grant punitive damages in favor of the plaintiffs as against defendant Jason Albertson in the amount of $10,000.00, and also granted punitive damages in favor of the plaintiffs as against defendant Shearson/American Express, Inc. in the amount of $100,000.00.

NOW, THEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs be awarded judgment against the defendants Shearson/American Express, Inc., and Jason Albertson, jointly and severally, in the amount of TWENTY ONE THOUSAND NINE HUNDRED FIFTY-NINE and 74/100 ($21,959.74) DOLLARS, together with interest thereon from December 10, 1981, to the date of this judgment at the rate of ten (10%) percent per annum, and interest on the total amount of the foregoing shall accrue from the date of this judgment at the rate of 10.25 percent per annum; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs be awarded judgment against the defendant Shearson/American Express, Inc., in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, together with interest thereon from the date of this judgment at the rate of 10.25 percent per annum; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs be awarded judgment against the defendant Jason Albertson in the sum of TEN THOUSAND ($10,000.00) DOLLARS, together with interest thereon from the date of this judgment at the rate of 10.25 percent per annum; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs be awarded costs herein as against the defendants, jointly and severally.

DONE IN OPEN COURT this 15 day of July, 1983.

C. A. MUECKE, Chief Judge

The undersigned has read the foregoing Judgment, and approves the same as to form and content.

DATED this 6 day of July, 1983.

KEESAL, YOUNG & LOGAN
By MICHAEL M. GLESS
Attorneys for Defendants.

Office-Supreme Court, U.S.
FILED
OCT 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-486

IN THE

Supreme Court of the United States

October Term, 1984

SHEARSON/AMERICAN EXPRESS INC. and JASON ALBERTSON,

Petitioners,

v.

CHARLES E. NEELY and JO MARIE DiMAGGIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The petitioners improperly include 15 U.S.C. § 77bb as a statute which this matter involves, for the reason that both compensatory and punitive damages were awarded by the jury on pendent state claims for breach of fiduciary duty and negligence and not under the Securities Exchange Act of 1934, so the stated reference has no applicability to this proceeding.

II.

STATEMENT OF THE CASE

A. *Procedural History.*

Petitioners set forth that the complaint alleged that any loss in the account would be limited to five (5%) percent of the original portfolio.

The complaint is devoid of any such statement.

B. *Statement of Facts.*

Plaintiffs Charles Neely and Jo Marie DiMaggio are husband and wife. Ms. DiMaggio is 39 years old and has been blind since age 2-½ years. She has a Bachelor's Degree in Psychology and a Master's Degree in Counseling and Education. She was employed by the National Aeronautics and Space Administration in personnel and equal opportunity for ten (10) years, and is not presently employed. Charles Neely was a seminarian for six (6) years, receiving a Master's Degree in Religious Education, and was then a teacher of religion for 11-½ years, and for the last 1-½ years prior to opening the account at Shearson was a representative of National Write Your Congressman, a political action organization. He had no business experience and never bought or sold securities prior to the Shearson account. Jason Albertson, the broker employed by Shearson, acknowledged that Neely had no knowledge of stocks when he first met him prior to the opening of the account. Jo Marie DiMaggio had purchased 30 shares each in Bell, Heckinger, and Marriott some years before with a small investment and just retained the share certificates without trading further or maintaining an account at a brokerage house. Albertson acknowledged that she had limited knowledge of stocks and was not a sophisticated investor.

Her father died in 1975 and in July 1977 a portfolio of stock was transferred to her from his estate. When she received the stock she placed it in a safe deposit box and received dividends. The stock was worth about $30,000.00 when received and about $65,000.00 in early 1981. The plaintiffs checked the value of the stock as best they could about once a year, but Neely couldn't always understand the abbreviations in the newspaper stock listings.

In early 1981 the plaintiffs had a $10,000.00 certificate of deposit that was about to mature and had heard from relatives about money market funds at brokerage houses and decided that they would then inquire about placing those funds in a money market account and have the stock portfolio professionally managed.

It was at that time that they went to Shearson to see a broker by the name of Alicia Dickenson, who they found was not then employed there any longer, and they met Jason Albertson for the first time. That was in February, 1981. The office of Shearson was in Lancaster, California, under the jurisdiction of Joseph Moure, manager of the Pasadena office. It was manned only by Albertson and a secretary.

At that first meeting the plaintiffs told Albertson that they had the $10,000.00 certificate of deposit and that they had a portfolio of stock almost all of which Jo Marie DiMaggio had inherited from her father, giving him the names and number of shares. They discussed various types of investments, including annuities, utilities, the money market account, and Albertson displayed on his computer terminal various stocks that would yield more than the three (3%) percent that they were earning. He gave them a prospectus for the money market fund (SDDI) and the meeting con-

cluded with the plaintiffs to review the material and return at a later date. They had told Albertson that they were interested in the money market account and wanted to have their portfolio professionally managed because it had increased substantially in value, they had no retirement plan and did want to protect what they had and that this was their "nest egg."

The next meeting took place on March 2, 1981. Plaintiffs then brought with them the certificates for the three (3) small issues (Bell, Heckinger, and Marriott) to have Mr. Albertson sell those for them. When they presented those certificates Mr. Albertson became upset and stated that he couldn't manage such a small account, at which time Albertson left the office, returning a short time thereafter to reassure plaintiffs that he understood Jo Marie DiMaggio's emotional attachment to the major portfolio by reason of its inheritance from her father and that he understood why she had not brought it in that day.

At that meeting Albertson then went on to tell them that he was a conservative broker, in fact his clients thought "too conservative", that he was not going "to churn their stocks like a drunken sailor", that he wasn't going to let them "take a bath", explaining in response to plaintiff's query that a "bath" would be less than five (5%) percent.

Albertson raised the issue of a discretionary account and told the plaintiffs that he wanted that so that he could go "back and forth" between the funds in the money market fund and stock, and that it would be used only in an emergency to protect them from some catastrophe and that he would otherwise telephone them before making a trade.

Albertson discussed options with plaintiffs although he

did not give them the options prospectus. He explained that the sale of options on stock they owned was "risk free" and that they couldn't lose on option sales. He told them that option purchases were speculative and risky.

When the question of risk came up at a time when Albertson was completing certain account forms he equated risk with the Boeing and General Dynamics stock in their original portfolio.

Albertson did not discuss a margin account with the plaintiffs.

At the March 2nd meeting Albertson completed a new account form on which he listed plaintiffs' investment objectives as being: Appreciation/Risk; Appreciation/Safety; Income/Safety. Not checked on that form were: Income/Risk; Speculative.

The next meeting of the parties took place on March 25, 1981. By this time Albertson, pursuant to plaintiffs' instructions, had sold the Bell, Heckinger, and Marriott stocks for a total of $2,076.00 which was credited to their account. Plaintiffs delivered to Albertson their handwritten letter of instructions with regard to their account. That letter expressed plaintiffs' understanding with Albertson resulting from the March 2nd meeting. It provided: (1) Account to be joint; (2) Limited discretion given to defendants; (3) Monthly statements to be furnished; (4) $10,000.00 to be added to their SDDI account on March 25th for a total of $12,000.00; (5) By April 20, 1981 $8,000.00 was to be added to the SDDI account to be taken from stock proceeds, for a total of $20,000.00; (6) Needed $400.00 per month in income from stock dividends; and (7) Remainder of stock to accumulate for growth.

Plaintiffs delivered their stock portfolio to defendants at that time, it then consisting of: 200 Amicor, 450 Boeing, 200 EG&G, 500 General Dynamics, 100 General Electric, 100 Global Marine, 303 Occidental Petroleum, all of which had a value on March 25th of approximately $63,213.00.

The total of stock and cash delivered into the account by plaintiffs was $75,289.00, consisting of Bell, Heckinger, and Marriott proceeds of $2,076.00, $10,000.00 cash and the above portfolio of $63,213.00.

Albertson was to "lighten" up their holdings in Boeing and General Dynamics and while the other issues might be sold if Albertson felt it appropriate for their objectives, he would first advise them of any proposed trade. Albertson liquidated the entire account substantially on March 25th and 26th and entirely within sixty (60) days. Notwithstanding that Jo Marie DiMaggio was available on the telephone all day every day and Charles Neely every day until about 9:00 a.m., Albertson never telephoned them or made any contact as to any trade. He did not tell them of the possible tax consequences (capital gains) of the sale of their portfolio which had a low basis and was held for a long term. Albertson was then told that they would be moving to Arizona and that they would shortly need $10,000.00 from the SDDI fund to purchase a new home, intending to leave a balance of $10,000.00 in the SDDI. Albertson told plaintiffs that there would be no problem earning $800.00 per month so that there was no question about producing $400.00 monthly, which they required.

Plaintiffs signed and delivered Shearson's Customer Agreement form on April 22, 1981.

Subsequent to the March 25th meeting immediately after liquidating a substantial portion of their original portfolio,

Albertson purchased stock and sold options for plaintiffs' account.

During the period of time that defendants managed the account there was a net loss in the account of $21,959.14. Plaintiffs had withdrawn $10,000.00 to purchase a home in Arizona, $6,000.00 to purchase special equipment for the blind for Jo Marie DiMaggio, and $3,000.00 for living expenses, thus reducing the original account from $75,289.00 to $56,289.00. They were charged $1,326.00 in interest on their margin account and paid defendants approximately $5,050.00 in commission. The sum of $3,000.00 which they withdrew came from their margin account, not from the sale of stock or cash in the SDDI account.

When plaintiffs received the April 30, 1981 statement Jo Marie telephoned Albertson because she didn't recognize the names of the stocks purchased. He assured her that they were all proper and satisfied her inquiry. Charles Neely then called Albertson because he didn't understand the monthly statement and was confused by the terms "priced portfolio value" (which showed $80,533.00) and "equity" (which showed $59,103.00). Albertson assured him that the higher figure was the important one and that everything was all right in the account. In that same statement the notation "$21,429.03 DR" appeared and plaintiffs did not understand that it meant they owed Shearson that sum on margin. (They didn't know they had a margin account, and didn't want one.) The notation "Market Maker" appeared in relation to certain of the transactions and they didn't know what it meant or that it had any significance, and Albertson never explained it to them. The word "call" appeared and they didn't know and weren't told that it referred to options.

Late in November, 1981 plaintiffs were told by a lecturer at a real estate seminar that it looked as if their stock portfolio was worth less than they believed it to be. At that time Charles Neely called Moure, Shearson's manager, and when Neely asked whether the apparent loss resulted from mismanagement Moure responded: "Well, I wouldn't go that far." Up until this time plaintiffs had confidence in Albertson and believed that he had been managing their account in accordance with their original discussions.

Albertson admitted that he did not comply with various of Shearson's internal regulations in the handling of plaintiffs' account, options were difficult to explain and that the prospectus was "difficult reading", that he traded in their account prior to April 22nd when he received the signed Customer Agreement form, various stocks that he bought for plaintiffs were "speculative" or a "gamble", that he had only two (2) or three (3) other discretionary authorizations in his twenty (20) year career. He testified that his personal portfolio, which included some of the same stock as plaintiffs and also commodities, was very speculative and that the conservative portion of his portfolio was real estate.

Joseph Moure, Shearson's manager, admitted that discretion is not used in 99.9% of the trades in the market, is not usually used for retail clients, is not encouraged by him, Shearson, or the industry; that the discretion was not effective until April 13th; that discretion was used in the Market Maker trades, which was contrary to Shearson's regulations and case decision; that he failed to comply with Shearson's regulation on account management; that Shearson's termination notice to the NYSE regarding Albertson related to a matter in addition to plaintiffs as to the reference therein that Albertson had committed unethical and improper acts.

Plaintiffs' experts testified as follows:

1. William Pluchel, Associate Vice-President at Dean Witter Reynolds at Phoenix, Arizona. Plaintiffs' primary objectives were income and liquidity. Long-term growth investments were not appropriate because they were moving to Arizona shortly after March 25, 1981, buying a new home, Charles Neely was entering a new profession (real estate sales). Their proper investment vehicle was utility stocks yielding 11%-12%, and a money market fund then paying 15%-16%. He testified that the goals checked off by Albertson were totally wrong, that discretion was in no way called for and a very unusual device. The facts upon which Albertson exercised the time/date (oral) discretion were insufficient in that there must be a specific order for a specific number of shares in a named stock which did not exist in this case. None of the stocks (except "possibly Amerada Hess") purchased in the Neely account by Albertson were suitable for them. A margin account was not at all appropriate, options should have been used to dispose of their long-held stock, none of the stocks purchased would have satisfied plaintiffs' income goal, merely because Albertson received Shearson's periodic recommended stock lists doesn't mean that those stocks were appropriate for plaintiffs because various investors have different objectives and while good for one investor they are not necessarily good for all, and speculative stocks were certainly not appropriate.

2. Eugene Tompane, in the securities business since 1928, formerly an allied member of the New York Stock Exchange, presently an investment advisor. Plaintiffs should have obtained short-term obligations, government bonds, investment and interest-bearing securities. Their investment objective was "very conservative." The few stocks purchased

in their account which might have been appropriate for long-term growth were rendered inappropriate by their sale within five (5) months. The American Cyanamid option was highly speculative and not proper. Discretion was not justified, nor was trading on margin. The rate of turnover was 3.03, which was excessive for the plaintiffs in relation to their investment objectives. That rate would be appropriate for a speculative account. For Albertson to have used discretion to purchase and sell stocks in which Shearson made a market was a definite conflict of interest. The claimed price/date discretion procedure used by Albertson was contrary to NYSE practice.

III.

ARGUMENT

A. Compensatory damages were awarded in an appropriate amount, consistent with the evidence and the agreed instructions to the jury.

Petitioners claim in Point V(A) that reversible error was committed in the trial court in that defendants were deprived of the opportunity of showing the change in market value during the critical period, and the effect thereof upon the award for compensatory damages.

The trial court, in its ruling on plaintiffs' Motion In Limine, ordered that defendants not introduce evidence as to what the course of plaintiffs' portfolio value would have been had they retained that portfolio in its original state and had no trading been conducted during the period in question.

As was pointed out by the trial court and by the Court of Appeals, the complaint of the plaintiffs was mismanagement by defendants and the resulting damage from that breach of fiduciary duty. The measure of damages was the actual loss

in portfolio value. Jury Instruction No. 67 (set forth in the Appendix hereto attached) was given by the court as an agreed instruction and, in defendants' Motion for a New Trial, they stated with regard thereto:

> 4. Instruction No. 67 related to breach of fiduciary duty and negligence theory. This permitted a maximum compensatory award of $21,959 representing plaintiffs' version of the entire loss in the account.
>
> It seems clear that the jurors chose Instruction No. 67 (breach of fiduciary duty-negligence) as the basis for their verdict since none of the other instructions would have permitted a compensatory award of $21,959.

That motion was denied by the trial court.

The Court of Appeals, in its opinion, in referring to the award of the jury and Instruction No. 67, stated:

> The jury's award of $21,959 is consistent with this instruction.

In addition to the foregoing, Jury Instruction No. 59 (a copy of which is hereto attached) set forth the generally accepted formula for determining damages in a Rule 10b-5 case as enunciated in *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77 (2d Cir. 1980). This was also an agreed instruction.

There is no conflict on this point and petitioners' position is not well taken.

B. The award of punitive damages was proper, and was consistent with the substantive law of the states of California and Arizona, which were the only states having contact with the parties and the subject matter; a ratio between compensatory and punitive damages is not applicable under the law of those states.

Petitioners next urge that the award of punitive damages is excessive in that it was (1) based upon an improper award of compensatory damages of $21,959.00 and (2) it was in excess of a three to one (3:1) ratio as expressed in *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318 (5th Cir. 1981).

At the outset, it is to be pointed out that all parties stipulated that the law of the case would be governed by the State of California where the contract was made, and where plaintiffs resided when most of the trades took place.

The award of punitive damages was made only upon the pendent state claims for breach of fiduciary duty and negligence, the same not being a permissible element of damage in a Rule 10b-5 action.

In *Miley v. Oppenheimer* the court, at page 331, expressly applied the state law of Texas with regard to punitive damages. That state has a four (4) part test, one of which is the ratio between exemplary and actual damages. In arriving at a ratio the court found three to one (3:1) to be appropriate.

California, and for that matter Arizona where the case was tried, do not adhere to the application of a ratio. Both of those states hold that the determination of the jury is conclusive so long as there is no passion or prejudice found to exist which caused the jury to hold as it did. Here defendants do not claim, and have never claimed, the existence of passion or prejudice.

In *Wetherbee v. United Insurance Company of America,* 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971) where the appellate court sustained punitive damages of $200,000.00 with compensatory damages of $1,050.00. The court held at page 681:

> There is no fixed ratio by which to determine a proper proportion between the two classes of damages; the factors influencing the amount of the exemplary award can only be disclosed by the trial record.

To the same effect: *Weisenburg v. Molina,* 58 Cal. App. 3d 478, 129 Cal. Rptr. 813 (1976); *Walker v. Signal Companies, Inc.,* 84 Cal. App. 3d 982, 149 Cal. Rptr. 119 (1978); *Mihara v. Dean Witter & Co., Inc.,* 619 F.2d 814 (9th Cir. 1980); *Nienstadt v. Wetzel,* 133 Ariz. 348, 651 P.2d 876 (1982).

With regard to the issue of punitive damages we have no conflict whatever as regards the decisions between the various Circuits. Whatever inconsistency there may be is with the substantive law of the several states, which is applied by the federal courts as regards pendent state claims which may come before them.

Notwithstanding that all litigants may regard their matter as being of great consequence, when viewed objectively the instant case involves nothing of "special or important" concern which might warrant a review by this court.

IV.

CONCLUSION

For the reasons set forth above, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Dated: October 18, 1984.

Respectfully submitted,

Albert M. Goldberg
ALBERT M. GOLDBERG, P.C.
Attorney for Respondents
Charles E. Neely and
Jo Marie DiMaggio

JURY INSTRUCTION NO. 59

Compensatory Damages for Churning

If you find that the defendants mishandled the plaintiffs' account in violation of Rule 10b-5 of the Securities Act of 1934, then the plaintiffs are entitled to damages to compensate them for their losses.

The amount of their compensatory damages is arrived at by taking the value of the original portfolio, adjust that sum by the percentage in change in the appropriate index like the Dow Jones Industrial Average, New York Stock Exchange Index, between the date the account was opened and the date that it was closed, deduct the funds that the plaintiffs withdrew, and then deduct the value of the portfolio as of the date that the account was closed.

JURY INSTRUCTION NO. 67

Damages for Breach of Fiduciary Duty

If you find that the defendants breached their fiduciary duty owed to the plaintiffs, then you are to award plaintiffs damages equal to the loss in portfolio value, including any excessive commission, which resulted from that breach of duty.